European Parliament issues Report on the proposal for a CCCTB

Introduction
On April 19, 2012 the European Parliament (“Parliament”) voted in favour of a series of amendments to the proposal (“Proposal”) for a Council Directive on a Common Consolidated Corporate Tax Base (“CCCTB”) that was released by the European Commission (“Commission”) on March 16, 2011. The amendments proposed by Parliament include significant changes to the initial Proposal, such as the mandatory implementation of the CCCTB for all but small-and-medium sized enterprises (“SMEs”), a stricter general anti-abuse rule, an amended sharing formula in which the factor sales plays a less important role, a possible harmonization of tax rates and the introduction of a so-called CCCTB Forum. The proposed changes, which were approved in full on April 19 by Parliament, were released in a Report on the proposal for a CCCTB on March 28, 2012 (“Report”).

Alongside Parliament’s work on the Report, the Council has already been working on the text of a CCCTB directive on the basis of the Commission’s Proposal. In a working paper from the Presidency of the Council (“Presidency Note”), the Council already proposes changes to Chapters II, IV-VII and XII-XV, and Annex III. In this update we will not discuss the Presidency Note in full, but we will only refer to the changes proposed by the Council that relate to the changes proposed by Parliament.

Legal framework
Parliament has submitted its Report as part of the consultation procedure initiated by the Council of the European Union (“Council”). The consultation procedure is one of the two legislative procedures referred to in Article 289 (2) TFEU under the name of the ‘special legislative procedure’. The consultation procedure generally includes three stages: (a) the Commission submits a proposal to the Council, (b) the Council Consults Parliament and, under circumstances, also the European Economic and Social Committee (“EESC”) and/or the Committee of the Regions (“COR”) and (c) the Council adopts the measure in question acting either by qualified majority (Article 114 TFEU) or by unanimity (Article 115 TFEU), depending upon the field at stake. The legal basis for the consultation procedure in the case of the CCCTB can be found in Article 115 TFEU; under Article 115 TFEU the Council is to adopt directives unanimously after consulting Parliament and the EESC if such directives “directly affect the establishment and functioning of the internal market”. Direct tax legislation such as the CCCTB is considered to be such measure. It is hereby noted that not only Parliament, but also the EESC and the COR have issued opinions on the Proposal. These opinions shall not be the subject of discussion of this update.

1 A7-0080/2012; in the report also an explanatory statement, an opinion of the Committee on Legal Affairs on the legal basis and an opinion of the Committee on the Internal Market and Consumer Protection were included
2 The Presidency Note has not yet been published (officially)
3 Parliament, i.e., its Committee on Economic and Monetary Affairs, issued the Report after having requested and having received the opinion of the Committee on Legal Affairs on the legal basis and the opinion of the Committee on the Internal Market and Consumer Protection.
4 EESC/2011/1585; issued on October 26, 2011 and having its legal basis in Article 115 TFEU
5 COR/2011/152; issued on February 23, 2012 and having its legal basis in Article 307 (1) TFEU
The main outcome of the consultation of Parliament is that Parliament (a) approves the Commission proposal as amended by Parliament and (b) calls on the Commission to alter its proposal according to Parliament’s proposed amendments.

Parliament’s request to the Commission is based on Article 293 (2) TFEU which states that “as long as the Council has not acted, the Commission may alter its proposal at any time during the procedures leading to the adoption of a [European] Union act”. It is expected that the Commission shall deliver an opinion on each of the amendments proposed by Parliament further to Parliament’s request, after which the Council shall decide on the modified proposal.

Amendments proposed by Parliament
As mentioned above, the amendments proposed by Parliament include significant changes to the initial Proposal, such as (a) the mandatory implementation of the CCCTB for all but SMEs, (b) a stricter general anti-abuse rule, (c) an amended sharing formula in which the factor sales plays a less important role, (d) a possible harmonization of tax rates and (e) the introduction of a CCCTB Forum.

(a) Mandatory implementation of the CCCTB for all but SMEs
Whereas the Commission proposed a CCCTB which would be optional, Parliament proposes a CCCTB that becomes compulsory after a brief transition period:®

- 2 years after the introduction of the CCCTB, the CCCTB system becomes applicable to European companies and European cooperatives which by their nature operate across borders;
- 5 years after the introduction of the CCCTB, the CCCTB system becomes applicable to all companies except SMEs;® and
- when the time comes for the Commission to assess the application of the directive, consideration must be given to whether it is desirable, worthwhile or necessary also to make the CCCTB system compulsory for SMEs and if appropriate draft a proposal for amending the directive.

(b) Stricter general anti-abuse rule
Parliament’s intention is to introduce a more effective general anti-abuse rule by proposing a stricter anti-abuse rule than was proposed by the Commission; Parliament proposes that “artificial transactions carried out mainly for the purpose of avoiding taxation shall be ignored for purposes of calculating the tax base”, instead of that “artificial transactions carried out for the sole purpose of avoiding taxation shall be ignored for purposes of calculating the tax base”.

On the basis of the Presidency Note, it is expected that the Council will follow the changes proposed by Parliament; in the Presidency Note, Article 80 (the general anti-abuse rule) states that “transactions or series of transactions carried out for the sole or main purpose of avoiding taxation shall be ignored for the purposes of calculating the tax base”. The Presidency Note also proposes a clarification in paragraph 2 by stating that “the first paragraph shall not apply to genuine commercial activities carried out for valid commercial reasons”.

Alongside the stricter general anti-abuse rule and in the light of a wish for more effective anti-abuse measures in the CCCTB, Parliament also proposes changes to Article 73 (the Switch-over clause) and Article 82 (Controlled Foreign Companies clause); Parliament proposes changing the percentage of 40% to 70%, as a

6 Amendments 14, 21 and 22 of the Report; changes proposed to Recital 8, Article 6a (new) and Article 6b (new)
7 In order to determine what an SME is, the definition from Commission Recommendation 2003/361/EC would be applied
8 Amendments 15 and 28 of the Report; changes proposed to Recital 20 and Article 80.
result of which fewer companies would qualify under the Switch-over clause and more companies would fall under the Controlled Foreign Companies clause.\(^9\)

The Presidency Note does not (yet) propose these changes to Article 73 and Article 82. It however does propose expanding the reach of Article 82 to permanent establishments in low tax countries by inserting a third paragraph in Article 82 which states that “The tax base shall include profits from a permanent establishment in a third country where the conditions in point (b) and (c) in paragraph 1 and paragraph 2 are fulfilled”.

(c) Amended sharing formula in which the factor sales plays a less important role

Whereas the Commission proposed a sharing formula in which the factors sales, labour and assets were given equal weight, Parliament now proposes a formula where sales, labour and assets are weighted at 10%, 45% and 45% respectively.\(^10\)

The sharing formula as proposed by Parliament would be as follows:

\[
\text{Share} \ A = \left( \frac{1}{10} \text{Sales}^A + \frac{9}{20} \text{Payroll}^A + \frac{1}{2} \frac{\text{No of employees}^A}{\text{employees}^\text{Group}} \right) + \left( \frac{9}{20} \frac{\text{Assets}^A}{\text{Assets}^\text{Group}} \right) \times \text{Consolidated Tax Base}
\]

The reasoning given by Parliament for the lower weight given to the factor sales is that this would on the one hand “make sure that the CCCTB system does not deviate too much from the internationally accepted principle of attributing ultimate taxing rights to the source state”, whereas on the other hand “it would also ensure that small and medium-sized Member States with limited domestic markets are not disproportionately disadvantaged in the apportionment of the tax base”.\(^11\)

Furthermore, as also mentioned by in the opinion issued by the Committee on the Internal Market and Consumer Protection, the sales factor based on destination would be rather easy to manipulate, i.e., be subject to abuse rather easily, for instance “by contracting an independent sales agent (located in a non-CCCTB State) as an intermediary to do the sales on behalf of the group to the relevant market, and thereby move the destination of the sales from the ‘intended’ state to the state of choice”.\(^12\)

(d) Possible harmonization of tax rates

However Parliament in principle agrees with the Commission that the CCCTB should not cover the harmonisation of corporate tax rates within the CCCTB states, Parliament does state that the harmonisation of corporate tax rates should be left open as an option in case it “becomes apparent that the economic efficiency, effectiveness and equitability of corporate taxation would benefit from an introduction of minimum rates”\(^13\).

Parliament not only hints on the introduction of actual minimum rates, but also the introduction of a certain bandwidth would be an option.

---

9 Amendments 27 and 29 of the Report; changes proposed to Article 73 and Article 82.
10 Amendments 16 and 31 of the Report; changes proposed to Recital 21 and Article 86
11 Report, p. 21
12 Report, p. 34
13 Amendment 10 of the Report; changes proposed to Recital 5a (new)
(e) Introduction of a CCCTB Forum

Parliament proposes the introduction of a CCCTB Forum, which would operate in a similar way as the EU Joint Transfer Pricing Forum (“JTPF”). The JTPF was created by the Commission in 2002 and consists of representatives of the 27 EU member states and (currently 12) representatives of the private sector. The JTPF operates on the basis of consensus to propose to the Commission pragmatic non-legislative solutions to practical problems posed by transfer pricing practices in the EU. By the introduction of the CCCTB Forum, Parliament not only introduces an out of court dispute settlement solution for companies and Member States, but it also introduces an institute where both companies and Member States seeking for advice can refer to.14

Conclusion

For the moment, Parliament has fulfilled its task by issuing and approving the Report.15 Now the Commission will have to comment on Parliament’s Report and subsequently the Council will have to take a decision on the modified Proposal. In this respect, it should finally be noted that Parliament already anticipates on a possible negative decision of the Council by requesting the Council to take appropriate measures to stimulate enhanced cooperation between Member States in case the CCCTB proposal would not be adopted.16

---

14 Amendment 19 and 34 of the Report; changes proposed to Recital 23a (new) and Article 123a (new)
15 Further to its request to the Council, Parliament could be consulted again by the Council if the Council intends to amend the (modified) Proposal substantially.
16 Amendment 6 of the Report; changes proposed to Recital 4a (new)
Colophon

Although this publication has been compiled with great care, Loyens & Loeff N.V. and all other entities, partnerships, persons and practices trading under the name ‘Loyens & Loeff’, cannot accept any liability for the consequences of making use of this issue without their cooperation. The information provided is intended as general information and cannot be regarded as advice.